90-1498

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1990

THOMAS GARDNER, Individually, and as Executive Director of the Florida Department of Natural Resources, and MAJOR RONALD MCCULLERS, Individually, and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Petitioners,

v.

FREEMAN R. BATEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March __, 1991

QUESTION PRESENTED

In this case challenging the validity of a Florida Statute, the Circuit Court below affirmed an award by the District Court of $80,399.76 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. This petition raises the following questions which go to the validity of the two bases of the award:

1.

DOES THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT CREATE RIGHTS FOR THE PLAINTIFF WHICH ARE ENFORCEABLE PURSUANT TO 42 U.S.C. § 1983 THEREBY ENTITLING PLAINTIFF TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988?

2.

DOES FLORIDA'S ENFORCEMENT OF ITS STATUTES ON THE HIGH SEAS AGAINST ONLY FLORIDA REGISTERED VESSELS CONSTITUTE UNLAWFUL DISCRIMINATION AGAINST ITS OWN CITIZENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The decision on the merits is reported as *Bateman v. Gardner,* 716 F.Supp. 595 (S.D. Fla. 1989).

The order awarding attorney's fees is reported as *Bateman v. Gardner,* Case No. 87-10062-Civ-King (S.D. Fla. Jan. 12, 1990).

The decision from the Eleventh Circuit Court of Appeals is reported as *Bateman v. Gardner,* Case Nos. 89-5851 and 90-5125 (11th Cir., Dec. 20, 1990).

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals below directly conflicts with a decision of the Ninth Circuit on an identical federal question. The Ninth Circuit, in *North Pacific Vessel Owners Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(unpublished opinion attached at appendix "E"), held that the Magnuson Act did not create individual rights enforceable under 42 U.S.C. § 1983; the court below in this case found that the same act did create such enforceable rights.

The decision of the Eleventh Circuit also directly conflicts with this Court's decision in *Skiriotes v. Florida,* 313 U.S. 69 (1940). In that case, this court held that a fishing regulation applicable to Florida citizens on the high seas was a valid exercise of the state's sovereign power that cannot violate the equal protection clause of the fourteenth amendment to the United States Constitution. The holding in this case directly conflicts with *Skiriotes* by finding a Florida fishing regulation applicable in federal waters only to Florida registered vessels does violate the equal protection clause.

The Court of Appeals for the Eleventh Circuit rendered the judgment sought to be reviewed on December 20, 1990. This Court has jurisdiction to issue a writ of certiorari to the court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves construction of:

Equal Protection clause of Amendment XIV, *United States Constitution;*

Magnuson Fisheries Conservation and Management Act, 16 U.S.C. § 1801, *et seq.;*

Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, 50 C.F.R. 658, *et seq.;*

42 U.S.C. §§ 1983, 1988; and

Section 370.151, Florida Statutes (1987).

(See appendix for relevant text of statutory provisions.)

This Court should exercise its discretionary review of this case because the decision of the United States Court of Appeals for the Eleventh Circuit (1) has rendered a decision which is in conflict with the decision of another court of appeals on the same matter [SC R10.1(a)]; (2) raises an important question of federal law which has not been, but should be, settled by this Court [SC R10.1(c)]; and (3) has decided a federal question in a way which conflicts with applicable decisions of this Court [SC R 10.1(c)].

STATEMENT OF THE CASE

Respondent, Freeman R. Bateman, is a Florida resident and Florida licensed fisherman. He brought this action in the United States District Court for the Southern District of Florida asserting that § 370.151, Florida Statutes, was preempted by the enactment of the Magnuson Fishery Conservation and Management Act (hereafter Magnuson Act), 16 U.S.C. § 1801 *et seq.*, and its implementing regulations, specifically 50 C.F.R. 658, *et seq.* The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343, 42 U.S.C. § 1983 (civil rights), 28 U.S.C. § 2201 (declaratory judgment), and 16 U.S.C. § 1861(d)(Magnuson Act).

Section 370.151, Florida Statutes, designates the Tortugas Shrimp Bed as an area where shrimping would be prohibited. The sanctuary described in § 370.151, Florida Statutes, includes areas within the exclusive economic zone of the United States, outside Florida territorial waters. Florida acknowledged that it could, and did, enforce this prohibition in the area beyond the territorial sea against Florida registered vessels only. The Magnuson Act explicitly authorizes states to regulate "vessels registered under the law of that State" in federal waters. 16 U.S.C. § 1856(a)(3).

Subsequently, the Department of Commerce created its own shrimp sanctuary in the same area, which sanctuary did not include all of the state-established sanctuary. 50 C.F.R. 658.22. The area included in the state sanctuary, but excluded from the federally created sanctuary, is the subject of this case.

The Respondent asserted in the District Court that the Florida regulation in that zone was not valid because: 1) the Respondent had a right to fish in federal waters under the Magnuson Act free of state regulation; 2) the state created

sanctuary in federal waters was preempted by the federally created sanctuary in the same area; and 3) by regulating the shrimping activities of its citizens but not those of other states, the statute violated the equal protection clause.

The case was decided on cross motions for summary judgment. The District Court invalidated the state created sanctuary on two grounds: 1) because "the net effect of the Florida legislature's action was discrimination against its own citizens," (*Bateman v. Gardner,* 716 F.Supp. 595, 597 (S.D. Fla. 1989), it violated the equal protection clause, and 2) the federal regulation preempted the state sanctuary.

On January 12, 1990, the District Court issued its order awarding attorney's fees pursuant to 42 U.S.C. § 1988. The court based the award on two findings. First, the court found a violation of the equal protection clause, and, second, the court held that the Magnuson Act creates rights enforceable under 42 U.S.C. § 1983 thereby allowing for § 1988 fees to be awarded for the court's holding under the Supremacy clause.

On appeal, the Eleventh Circuit, on December 20, 1990, affirmed the two orders of the lower court by a *per curiam* summary affirmance without opinion relying on the opinions below. (See appendix "C"). The United States sought clarification on the equal protection holding, expressing the view that this construction of the equal protection clause would impair the cooperative regulatory scheme between the state and federal governments in federal waters. (Motion attached at appendix "H"). That motion was denied.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

By affirming case no. 90-5125 (the award of attorney's fees), the Eleventh Circuit affirmed the District Court's holding that the Magnuson Act created "rights enforceable under § 1983." (App. "B"). Because the Supremacy Clause does not, of its own force, create rights enforceable under § 1983 (*Dennis v. Higgins,* 59 U.S.L.W. 4117, 4120 (Feb. 20, 1991)), the District Court found an individual right of action under the Magnuson Act and awarded Respondent attorney's fees under 42 U.S.C. § 1988.

The District Court below gave scant explanation for its conclusion that such a right exists and the Eleventh Circuit affirmed without opinion. In contrast, the Ninth Circuit applied the analysis found in the opinions of this Court for this question and determined that no such right existed under the Magnuson Act. *North Pacific Vessel Owners' Assoc. v. Sheffield,* 852 F.2d 572 (9th Cir. 1988)(unpublished opinion, affirming denial of attorney's fees under 42 U.S.C. § 1988, attached at appendix "E").

In *Sheffield,* the Ninth Circuit applied the two-pronged analysis set forth in *Golden State Transit v. Los Angeles,* 107 L.Ed.2d 420 (1989), to the Magnuson Act and found that there was no "right to fish" created by the Act that would be enforceable under § 1983. That court also found that the enactment of a comprehensive enforcement scheme fore-

closed any private enforcement of the Act through § 1983. Consistent with earlier Ninth Circuit opinions, that court held that the plaintiffs therein were incidental beneficiaries of the Magnuson Act's restrictions on foreign fleets, but that the Act conferred no rights on them. The *Sheffield* court cited *California v. Sierra Club,* 451 U.S. 287, 294 (1981), implicitly likening the Magnuson Act to the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq.,* which, as a general regulatory act, conferred no private rights; the Magnuson Act also is a general regulatory act conferring no rights.

All violations of federal law do not necessarily constitute violations of a federal right. *Golden State Transit v. Los Angeles,* 107 L.Ed.2d at 427. In *Golden State,* this Court set forth a two-pronged analysis for determining whether a federal statute created rights enforceable under § 1983. First, the court must determine whether the statute creates rights by focusing on whether the putative plaintiff is an intended beneficiary of such rights. *Id.* at 430. However, where "Congressional preemption benefits particular parties only as an incident of the federal scheme of regulation . . . § 1983 may not be available." *Id.* Second, the court must determine whether the statute contains a comprehensive enforcement scheme which would preclude private enforcement under § 1983.

This two-pronged analysis should have formed the basis for a finding by the District Court that the Magnuson Act does not create a right enforceable under § 1983, consistent with the opinion of the Ninth Circuit in *Sheffield.* The opinion of the Eleventh Circuit, in affirming the District Court's order awarding attorney's fees, directly conflicts with the holding of the Ninth Circuit in *Sheffield* and this Court should exercise its discretion to review this case in order to decide this issue. SC R10.1(a). In addition, because the federal and state governments are continually expanding their regulation of the increasingly scarce resources of

the sea, this issue will inevitably continue to be raised.[1] This important question of federal law has not been addressed with respect to the Magnuson Act and the conflict between the two circuits which have addressed the question should be resolved by this Court. SC R10.1(c).

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH AN APPLICABLE DECISION OF THIS COURT.

This Court held in *Skiriotes v. Florida,* 313 U.S. 69, 73 (1940), that a state regulation of its citizens on the high seas was not an equal protection violation if it applied equally to all persons within the state's jurisdiction. Section 370.151, Florida Statutes, lives up to that standard. This statute was applied to Florida registered vessels on the high seas, the only vessels over which Florida can exert jurisdiction. The District Court gave no explanation why the holding in *Skiriotes* did not apply, and actually announced a diametrically opposite rule. *Bateman,* 716 F.Supp. at 597. Under the holding of the District Court, no Florida regulation could be enforced against only Florida registered vessels on the high seas without violating the equal protection clause. This finding of an equal protection violation by the District Court directly conflicts with this Court's holding in *Skiriotes,* and this Court should exercise its discretion to review this case. SC R 10.1(c).

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1 Two cases currently pending in the District Courts of Florida raise the same issues presented here. *Raffield v. Gissendanner,* case no. 90-50143-WS (N.D. Fla.), and *Southeastern Fisheries v. Martinez,* case no. 90-10071-Civ-King (S.D. Fla.).

CONCLUSION

The lower courts' holdings conflict with the holding of the Ninth Circuit in *Sheffield* and this Court's decision in *Skiriotes*. In addition, this is an important question of federal law which will continue to arise in the context of conflicts between state and federal fisheries regulations which has not been, but should be, addressed by this Court. This Court can and should issue a writ of certiorari to the Circuit Court of Appeals for the Eleventh Circuit reversing that court's holding on the issues raised in this petition and reversing Respondent's award of attorney's fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10062-CIV-KING

FREEMAN R. BATEMAN,

Plaintiff,

v.

TOM GARDNER,
individually, and as
Executive Director of the
Florida Dept. of Natural
Resources, *et al*,

Defendants.

FINAL SUMMARY JUDGMENT

The court today faces several problems that have resulted from the apparently admirable efforts of Florida and the United States to protect an area of incredible natural beauty, the water surrounding the Dry Tortugas. To preserve the unique sea life in this area, both Florida and the federal government have enacted statutes and regulations that manage fishing in the region. The overall effect of this cooperative effort has been confusion, especially with respect to shrimping. The federal government bars shrimping in certain areas and allows it in others, while Florida prohibits its own shrimpers from shrimping in the entire area.

The plaintiff, a Florida resident and Florida licensed fisherman, brings this action under the Civil Rights Act and the United States Constitution, alleging that he is a victim of unfair discrimination. The recurring statement of the

plaintiff's claim is a violation of the equal protection clause. The plaintiff notes that the Florida statute regulating shrimping prohibits Florida shrimpers from a certain area, but does not prohibit shrimpers registered in other states. The plaintiff seeks a declaration that the metes and bounds description of the shrimping area protected by Florida violates the United States Constitution, and directly conflicts with the Magnuson Act, 16 U.S.C. § 1801, *et. seq.*, and the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. 658, *et. seq.* After considering the arguments of counsel on the cross-motions for summary judgment, the court finds the plaintiff's contentions are meritorious.

PROCEDURAL HISTORY

In August of 1987, the plaintiff commenced this action seeking declaratory and injunctive relief against the state officials in charge of enforcing *Fla. Stat. Ann.* § 370.1512 (sic), the Florida statute regulating shrimping in the Dry Tortugas. Shortly thereafter, both the plaintiff and the Florida officials cross moved for summary judgment.

After a hearing on the motions for summary judgment, on October 5, 1988, this court preliminarily determined that the plaintiff was being denied equal protection of law as a result of the combined operation of *Fla. Stat. Ann.* § 370.152 (sic) and 16 U.S.C. § 1856(a)(3), a key provision of the Magnuson Fisheries Act. The court ordered that the Attorney General of the United States be notified pursuant to 28 U.S.C. 2403(a) because the plaintiff was making a constitutional challenge to an act of Congress.

On November 4, 1988, the United States sought intervention as a party plaintiff. The government sought to uphold the constitutionality of 16 U.S.C. § 1856(a)(3), and they

contended that no equal protection violation occurred. The government argued that any constitutional challenge to the Florida statute is obviated by the fact that a federal statute preempted the state statute.

All the parties agree that no genuine issue of material fact exists, and, thus, this case can be decided as a matter of law. The court has reviewed memoranda in support of the motions for summary judgment and after reviewing the relevant statutory framework, the court grants the plaintiff's motion for summary judgment.

STATUTORY FRAMEWORK

In 1976, Congress enacted the Magnuson Fisheries Conservation and Management Act, 16 U.S.C. § 1801 *et. seq.* The Act grants the federal government exclusive fishery management authority within the "Exclusive Economic Zone" ("EEZ"). 16 U.S.C. §§ 1801(b)(1), 1811(a). Presidential proclamation 5030, dated March 10, 1983, established the EEZ. The EEZ is a zone or border which extends from the outer boundary of each state's territorial waters to a line two-hundred miles off-shore. *See Proclamation* no. 5030, 3 C.F.R. 22-23 (1983 compilation). The territorial waters of each state are not part of the EEZ.

The Magnuson Act provides that the states cannot regulate, directly or indirectly, any fishing vessel outside their respective territorial borders "unless the vessel is registered under the law of that state." 16 U.S.C. § 1856(a)(3). Prior to the enactment of the Magnuson Act, a state could regulate its state registered vessels and state citizens while fishing in what is now the EEZ pursuant to a line of Supreme Court cases culminating in *Skiriotes v. Florida,* 313 U.S. 69 (1941).

In 1957, prior to the passage of the Magnuson Act, the Florida Legislature enacted *Fla. Stat. Ann.* § 370.151 for the conservation of the supply of shrimp. The state sets out an area of shrimp beds off the coast of the Florida Keys, known as the "Tortugas Shrimp Bed," where shrimp trolling is prohibited. Much of this area is beyond the territorial limits of Florida. In its filings before this court, Florida acknowledges that it has no authority under the Magnuson Act to enforce *Fla. Stat. Ann.* § 370.151 against non-Floridians outside the state's territorial waters.

In 1981, the United States Secretary of Commerce implemented the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated in 50 C.F.R. part 658. In recognition of the importance of protecting shrimp nursery beds, the management plan has set aside an area in the Gulf EEZ near the Florida Keys in which fishing is generally closed to all shrimp fisherman. 50 C.F.R. § 658.22. This area, known as the "Tortugas Shrimp Sanctuary," is entirely outside the territorial limits of the state of Florida.

The shrimp beds protected by 50 C.F.R. § 658.22 and *Fla. Stat. Ann.* § 370.151 substantially overlap. Nonetheless, a portion of the state-created "Tortugas Shrimp Bed," lying outside the territorial waters of the state of Florida and within the EEZ, is not included within the boundaries of the federally-created "Tortugas Shrimp Sanctuary." In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida statute prohibits Floridian fisherman from doing so.

DISCUSSION

For two reasons, the court finds that the defendant's application of *Fla. Stat. Ann.* § 370.151 is unconstitutional in part. Specifically, both the equal protection and supremacy clauses require that a limited part of this Florida statute be struck down.

The court specifically notes that the impetus for the filing of this action was discriminatory impact. The Florida Legislature desired to prohibit shrimping in this region. The legislature first prohibited all shrimpers from the state's own waters. The legislature, however, did not stop its protection here. The legislature used discretion given to them by the Magnuson Act and prohibited its own shrimpers from the federal area. The net effect of the Florida legislature's action was discrimination against its own citizens, for only they were prohibited from portions of the federal area. The Florida legislature's action in prohibiting its own shrimpers from the federal waters violated the equal protection clause. Moreover, the Florida legislature offered no reason for discriminating against its own citizens in favor of out of state shrimpers. The legislature did not have to prohibit Florida shrimpers from this are. Its decision to do so, however, violated the equal protection clause.

The operation of the supremacy clause also corrects this discrimination. The United States argues that the federal Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, as promulgated by the Secretary of Commerce, 50 C.F.R. Part 658, preempts *Fla. Stat.* § 370.151(2) insofar as the Florida statute prohibits the plaintiff from shrimping in the disputed area. The United States asserts that under preemption principles, the court can resolve the present controversy. Specifically, the federal government notes that preemption of the Florida statute as it applies to shrimping in the disputed area eliminates the unequal

treatment of persons from different states, the problem which is of the greater concern to this court.

Pursuant to the Supremacy Clause of the Constitution, Art., VI, cl. 2, the laws of the United States, including both federal statutes and federal regulations properly promulgated pursuant to statutory authorization, take precedence over state law. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories,* 471 U.S. 707, 714 (1985). Preemption of state law by federal law can occur in several way, including as a result of a conflict between federal and state law. *Id.* at 713, 14; *Schneidewind v. ANR Pipeline Co.* 108 S.Ct. 1145, 1150-51 (1988). Such a conflict occurs when it is impossible to comply with both state and federal law, or when the state law stands as an obstacle to accomplishment of congressional purposes. *Schneidewind,* 108 S.Ct. at 1150-52.

In the present case, *Fla. Stat.* § 370.151(2) conflicts with the federal Gulf Shrimp Plan as promulgated by the Secretary of Commerce. Under the federal regulation, the plaintiff may take shrimp in the disputed area, while under the state statute, he may not. *See State v. Sterling,* 448 A.2d 785 (R.I. 1982)(state fishing law conflicts with federal Magnuson regulation where federal regulation permits larger flounder take than does state law). Moreover, one purpose behind the promulgation of federal Magnuson regulation was to promote domestic commercial fishing. 16 U.S.C. § 1801(b)(3). The Florida statute stands as an obstacle to the accomplishment of this purpose by precluding Florida fishermen from participating in commercial shrimp fishing in the disputed area. Under preemption principles, this conflict must be resolved in favor of the enforcement of federal law. Accordingly, the court

ORDERS and ADJUDGES as follows:

1.*Florida Stat. Ann.* § 370.151(2) violates the

equal protection clause of the U.S. Constitution insofar as it restricts only Florida shrimpers from federal waters.

2.50 C.F.R. Part 658 preempts § 370.151(2) insofar as *Fla. Stat. Ann.* 370.151(2) prohibits shrimping where the federal regulations allow it.

3.The defendants are enjoined from enforcing *Fla. Stat. Ann.* § 370.151(2) in a manner that violates the equal protection clause or conflicts with the applicable federal regulations.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 11th Day of July, 1989.

_____/s/_____

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

sar

cc:David Paul Horan, Esq.
Eric J. Taylor, Asst. AG
Richard Harrison, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-10062-CIV-KING

FREEMAN R. BATEMAN, SR.,

Plaintiff,

v.

THOMAS GARDNER, Individually and as Executive Director of the Florida Department of Natural Resources; and MAJOR RONALD MCCULLERS, Individually and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Defendants,

and

UNITED STATES OF AMERICA,

Intervenor.

ORDER AWARDING ATTORNEY'S FEES AND COSTS

In August of 1987, the Plaintiff commenced this action seeking declaratory and injunctive relief against state officials who were in charge of enforcing Florida Statute section 370.151(2). This Florida Statute seeks to regulate shrimping in the areas of the Lower Florida Keys and Dry Tortugas. On July 11, 1989, this court entered a Final Summary Judgment. *Bateman v. Gardner,* 716 F. Supp. 595 (S.D. Fla. 1989). The Plaintiff succeeded in all respects and secured an injunction against state interference with federally pro-

tected fishing rights based upon both the Equal Protection and Supremacy Clauses of the United States Constitution.

As prevailing party in this Title 42 USC 1983 action, the Plaintiff filed a Motion for Award of Attorney's Fees and Costs pursuant to Title 42 USC § 1988. The original Motion, Memorandum of Law and supporting Affidavits were filed in August of 1989 with a Supplement filed in September, 1989 and a Final Supplement filed January 5th, 1990.

In September, 1989, the Defendants submitted an extensive Memorandum of Law in Opposition to the Plaintiff's Request for Attorney's Fees. Counsel for the Defendant stipulated in the Memorandum and in open Court that the hours reflected in the billing were reasonable; however, the Defendant's grounds for opposition to portions of the requested fees can be easily divided into three separate grounds. First, the Defendants argued that there is no entitlement to fees for "cases brought under the Supremacy Clause of the United States Constitution" and that the preemption and equal protection holdings by this Court were "not closely related and the research that went into each issue is distinct from the other." The Defendant's second argument was that the Magnuson Act, Title 16 USC 1851 et.seq. did not create any rights, privileges or immunities for individuals which would be actionable under Title 42 USC 1983. Finally, the Defendants argued that "Plaintiff is entitled to no enhancement (of lodestar) whatsoever" in that "the issues were clear-cut and straight-forward". In arguing against any enhancement of lodestar, the Defendants stated that "Plaintiff has failed to produce any evidence that he would have been unable to hire counsel without the risk enhancement in the Key West or Miami area".

The Plaintiff, as the prevailing party in this civil rights litigation is entitled to an award of attorney's fees and costs. In holding that the Plaintiff is entitled to fees for all of the

hours expended, the Court notes that while it is abundantly clear that the Supremacy Clause *of its own force* does not create rights enforceable under § 1983, the Magnuson Act itself and the Fishery Management Plans adopted under the Act do grant rights enforceable under § 1983. The Magnuson Act does not preclude a § 1983 remedy as it provides no mechanism to address state interference with federally protected fishing rights. As the Court pointed out on page 6 of its Final Summary Judgment, "under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not." The Plaintiff showed that not only was Florida's enforcement a violation of federally protected fishing rights, but the enforcement violated Equal Protection rights in it's application.

The Plaintiff by relying on the Supremacy Clause to enjoin interference with federally protected fishing rights and by demonstrating violation of rights to equal protection under the law, has prevailed in this litigation under §1983, therefore, all of the hours spent in both preemption and equal protection research are compensable under 42 USC § 1988.

This Court further holds that the Plaintiff's claims arose out of a common core of facts and involve related legal theories. The Court holds that all of the issues, supremacy/preemption/equal protection were interrelated and inextricably intertwined. It was pointed out in *Hensley v. Ekhart,* 461 U.S. 424, 432 (1983) that "where a law suit consists of related claims, a Plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the District Court did not adopt each contention raised."

The Defendant's second argument that the Magnuson Act "does not create any rights, privileges, or immunities for individuals" is in error. The Magnuson Act was enacted to benefit and protect commercial fishermen like the Plaintiff.

It mandated, under 16 USC § 1851(4) that . . . "conservation management measures shall not discriminate between residents of different states". An action under § 1983 certainly provides a mechanism to address state interference with federally protected fishing rights under the Magnuson Act.

The Plaintiff, a commercial fisherman, is the intended beneficiary of a federal statutory scheme that gives all United States fishermen the continued right to make use of the federal fishery resources of the EEZ. The violation of a federal right that is implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation that is clearly set forth in the text of the statute. *Golden State Transit Corp. v. City of Los Angeles,* 110 S.Ct. 444 (1989).

The Defendant's final argument regarding enhancement of lodestar has been dealt with repeatedly by the federal courts. In March of 1989, the Eleventh Circuit decided in *Lattamore v. Oman Construction,* 868 F.2d 437 (11th Cir. 1989) and in July of 1989, the Ninth Circuit decided *Hasbrouck v. Texaco, Inc.,* 79 F.2d 632 (9th Cir. 1989). Both of these cases held that a multiplier of lodestar is justified as an adjustment for the risk of not prevailing. In *Hasbrouck,* the Ninth Circuit recognized "that competent counsel would not undertake representation of Plaintiffs in cases such as this if they were only paid their regular hourly rates." In *Lattamore,* Judges Fay Anderson and Henderson, upheld the District Court's award by stating, "that the relevant market for legal services enhances fees for contingency as a class by one hundred (100%) percent at the very least and that without enhancement, Plaintiff would have faced substantial, and probably insurmountable, difficulties in finding counsel in the relevant market."

The Plaintiff, in support of his request for a 2.5 lodestar enhancement, submitted the Affidavits of three (3) attor-

neys possessing a total of sixty (60+) years of trial experience. In all three (3) Affidavits, the attorneys concluded that none of them (nor any other attorney they knew) would have taken this case on a contingent fee basis without a substantial increase over their regular hourly fee. Finally, the Court notes that in light of the past decision of the Third District Court of Appeals in the case of *Potter v. McCullers,* 505 So.2d 511, (Fla. 3rd DCA 1987), which affirmed the Circuit Court validation of the state's extraterritorial enforcement of § 370.151(2) over Florida citizens, it is clear that the chances for success at the outset of this litigation were very unlikely. Based upon the contingent risk taken by Plaintiff's counsel, the lodestar enhancement should range from approximately 1.5 (where success is more likely than failure at the outset) to as much as 2.5 to 3.0 (when chances of success are unlikely at the time the case is initiated). See *Figa and Ranger Insurance Co., v. R/V M P Corp.,* 681 F.Supp. 806 (S.D. Fla. 1988). It is the finding of this Court than an enhancement for contingency of 2.0 is appropriate for the hours expended by Plaintiff's counsel especially in this case where the outcome of the case was in doubt. For those hours expended since the Court determined Plaintiff to be the prevailing party, no enhancement of lodestar would be justified.

The Court having considered the factors set out in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), finds that 103.1 hours were spent by attorney David Paul Horan prior to the time the outcome of the case was decided by this Court and an additional 71.5 hours was spent by a Junior Partner in his firm, Edward W. Horan. The Court finds that the customary billing in the relevant legal community for services regarding equally complex federal litigation is $200.00 per hour for David Paul Horan and $150.00 per hour for Edward W. Horan. Multiplying these rates times the hours spent, the lodestar subject to enhancement is Thirty-one Thousand, Three Hundred

Forty-five and No/100 ($31,345.00) Dollars and with enhancement of 2.0, a total of Sixty-two Thousand, Six Hundred Ninety and No/100 ($62,690.00) Dollars. The Court finds that David Paul Horan expended 59.8 hours which are not subject to enhancement, yielding a lodestar of Eleven Thousand, Nine Hundred Sixty and No/100 ($11,960.00) Dollars. Edward W. Horan spent an additional 27.8 hours which are not subject to enhancement, yielding a lodestar of Four Thousand, One Hundred Seventy and No/100 ($4,170.00) Dollars. The total lodestar plus enhancement where appropriate yields total attorney's fees of Seventy-eight Thousand, Eight Hundred Twenty and No/100 ($78.820.00) Dollars. Plaintiff's costs (undisputed by the defendants) were in the amount of One Thousand, Five Hundred Seventy-nine and 76/100 ($1,579.76) Dollars are taxed against the defendant. Plaintiff's fees plus costs, yield a total of Eighty Thousand, Three Hundred Ninety-nine and 76/100 ($80,399.76) Dollars to be taxed against the defendants, for which let execution issue.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Courthouse Square, Miami, Florida, this 12th day of January, 1990.

_____/s/_____

JAMES LAWRENCE KING
CHIEF U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF
FLORIDA

cc: All counsel of record.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

Nos. 89-5851 & 90-5125

D.C. Docket No. 87-10062-CIV-KING

FREEMAN R. BATEMAN, SR.,

Plaintiff/Counter-defendant Appellee,

versus

THOMAS GARDNER, individually and as Executive Director of Florida Department of Natural Resources, MAJOR RONALD MCCULLERS, Individually and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Defendants/Counter-plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(December 20, 1990)

Before HATCHETT and ANDERSON, Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

---

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

Case No. 89-5851 (the merits appeal) is affirmed on the basis of the district court's opinion dated July 11, 1989.

In light of the foregoing affirmance of the merits case, Case No. 90-5125 (the attorney's fee appeal) is affirmed pursuant to the concession of appellant, both in motion to this court and at oral argument.

AFFIRMED.

[1]370.151 Tortugas shrimp beds; closed areas; permits; penalties.—

(1) It is the intention of the Legislature that action should be taken to conserve the supply of shrimp in the large shrimp beds which lie in and around the coast of the Lower Keys of Florida and in the vicinity of the islands of Dry Tortugas in the Florida Keys, hereinafter referred to as the "Tortugas Shrimp Bed," and which furnish more than 50 percent of the shrimp in waters adjacent to the coast of Florida. It is further the sense of this Legislature that the shrimp industry is a valuable industry to the economy of this state and deserves adequate protection.

(2) Tortugas Shrimp Bed is described as follows:

(a) Begin at Coon Key Light in Collier County; thence proceed on a straight line to a point which is located at 25°54′30″ north latitude and 81°50′30″ west longitude; thence proceed on a straight line to a point located at 24°48′00″ latitude and 82°00′00″west longitude; thence proceed on a straight line to a point located at 24°45′00″ north latitude and 82°22′30″ west longitude; thence proceed on a straight line to Rebecca Shoals Light; thence proceed on a straight line to R. B. Bell Buoy; thence proceed on a straight line to Sand Key Light; thence proceed northerly to the abandoned lighthouse located in the southwest portion of Key West; thence along the south and east meandered shoreline of the Florida Keys and the connecting viaducts between said Keys to 80°30′00″ west longitude; thence north until a point on the mainland is reached; thence proceed west and north along the coast of the mainland of Florida until a point is reached which is located due north of the aforementioned Coon Key Light located in Collier County; thence due south to Coon Key Light, the point of beginning.

(b) No shrimping shall be permitted at anytime except live bait production as provided in this chapter in the above-described area.

North Pacific Fishing Vessel Owners' Association, et al.,
Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,
Defendants-Appellees.

No. 87-3646

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D. Alaska

AFFIRMED.

[Respondent's Note: The following is excerpted from the unpublished part of the opinion.]

Appeal from the United States District Court for the District of Alaska; James M. Fitzgerald, District Judge, Presiding.

Before EUGENE A WRIGHT, FERGUSON and BRUNETTI, Circuit Judges.

The North Pacific Fishing Vessel Owners' Association (NPFVOA) and two individual named plaintiffs (collectively hereinafter "appellants") appeal the district court's denial of their motion for attorney's fees under 42 U.S.C. § 1988. Appellants claim that the district court erred in ruling that they were not entitled to attorney's fees because they had not made a cognizable claim under 42 U.S.C. § 1983. Appellants argue that they made a valid statutory claim under the Magnuson Fishery Conservation and Management Act (Magnuson Act), as well as valid constitutional claims under

the Supremacy Clause, the Commerce Clause, the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under the Privileges and Immunities Clause of Article IV, section 2, and that any one of these provided a basis for a section 1983 claim.

I.

In 1978, the Secretary of Commerce, acting under the authority of the Magnuson Act (16 U.S.C. §§ 1801-1882), promulgated regulations which restricted vessels operating in Alaska's various geographic fishing areas delineated in the Act. These areas, or "Fishing Control Zones" ("FCZs"), encompassed the oceanic expanse from the Alaska's territorial boundary of three miles to a line 200 miles offshore. The relevant regulations defined certain areas to be nonexclusive. See 50 C.F.R. §§ 671.23, 671.24 (suspended 51 Fed.Reg. 40,027, 40,029 (1986), repealed 52 Fed.Reg. 17,577, 17,579 (1987)).

In March of 1983, the state of Alaska's Board of Fisheries adopted regulations for the 1984 Tanner crab season which designated as "super-exclusive" the same FCZS referenced in the federal regulations. Under these state regulations, anyone registered to take Tanner crab in the super-exclusive areas would not be permitted to fish or take crab in any other area. Violation of these regulations could result in potential seizure of the vessel and arrest. In addition, the state regulations placed restrictions on the number of crab pots that each vessel could use while operating in a separate area defined as the Kodiak District.

Shortly after the state adopted these regulations, the North Pacific Fishery Management Council, an advisory council to the Secretary of Commerce, considered whether the federal government should adopt the state restrictions at issue. The Council ultimately rejected the idea in Septem-

ber of 1983 in part because the Council found that, while unable to make a "quantitative estimate," they believed that the proposed regulations could have a disparate impact between "local" and "non-local" vessels.[1]

Just prior to the scheduled February 10 opening of the Tanner crab season, the governor's office issued a press release which stated that these new regulations would be specifically enforced. Shortly thereafter, appellants filed a complaint seeking declaratory and injunctive relief against enforcement of the state regulations. On February 9, the district court granted a temporary restraining order. That same day, the Alaska Board of Fisheries repealed the challenged regulations.

Appellants subsequently filed for attorney's fees. At a hearing on the motion, counsel for the state raised the possibility that the state might try to reenact the challenged regulations. Since such action would require appellants to go to trial on the merits of their claims — and thus possibly increase their attorney's fees — the court reserved its decision on appellants' motion for fees.

The parties later stipulated to a dismissal of the action, conditioned upon the state's agreement not to implement similar regulations in the future. Appellants then filed a supplemental motion for attorney's fees. On June 21, 1985 the district court issued an order dismissing the case, "subject to plaintiffs' motion and supplemental motion for an award of attorney's fees, costs, and expenses, both parties having reserved the right to appeal said disposition."

The district court's original dismissal order was premised exclusively on appellants' preemption claim. None of the

---

1 The Council defined local vessels to be "all boats whose home port was Chignik, Sand Point or King Cove, owned by a local resident who fishes predominantly in this area."

other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the district court issued an order denying the appellants' motion for attorney's fees. The court stated that, while appellants had "prevailed on the merits," they had failed to state any cognizable section 1983 claim. The court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of appellants' other claims sufficiently supported a request for attorney's fees under section 1988.

* * *

[II] A.

Appellants claim that they have a cause of action to enforce the Magnuson Act under section 1983 which entitles them to collect attorney's fees under section 1988. We disagree.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), the Supreme Court held that individuals may have a section 1983 cause of action against state officials for violations of federal statutes. However, two exceptions to this presumption that a section 1983 remedy exists were recently summarized by the Court as follows:

> where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of 1983.

Wright v. City of Roanoke Redevelopment & Housing Authority, [479 U.S. 418, 423] 107 S.Ct. 766, 770 (1987).

Regarding the first exception, this court has stated that where a statute's enforcement scheme is sufficiently comprehensive, an intent to foreclose private enforcement can

be inferred. *Almond Hill School v. United States Department of Agriculture,* 768 F.2d 1030, 1035 (9th Cir. 1985).

The Magnuson Act provides various enforcement mechanisms, and remedies including civil fines, civil forfeiture, and criminal penalties. 16 U.S.C. §§ 1858-1860. Enforcement responsibility for the Act has been entrusted to the Secretary of Commerce and "the Secretary of the department in which the Coast Guard is operating," and their delegatees. 16 U.S.C. § 1861(a). Section 1856(b) is especially relevant to the instant case in that it addresses circumstances in which state regulation lies in direct conflict with the federal regulatory scheme. The section provides that the Secretary of Commerce may exercise preemptive powers over a state fishing regulation, inter alia, where the state action "will substantially and adversely affect the carrying out of [the federal] fishery management plan...." 16 U.S.C. § 1856(b)(1)(B).

We hold that by enacting this comprehensive remedial scheme, Congress intended to foreclose private enforcement of the Act through section 1983.

Even if we did not find that appellants' cause of action was barred by the Act's comprehensive remedial scheme, however, appellants would still be barred by the second exception to the presumption of section 1983 availability because the Magnuson Act does not create enforceable rights in favor of appellants. Appellants contend that the Magnuson Act gives them a "right to fish." To have a federal right cognizable under section 1983, appellants must be members of the class for whose particular benefit the Magnuson Act was enacted. *See Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 672 (9th Cir. 1983) (reiterating the *Cort v. Ash,* 422 U.S. 66 (1975), analysis for implying private rights of action from statutes). "The question is not simply who would benefit from the Act, but whether Congress

intended to confer federal rights upon those beneficiaries." *California v. Sierra Club,* 451 U.S. 287, 294 (1981). While appellants are beneficiaries of the Act because of the Act's restrictions on foreign fleets, we find nothing in the statute which demonstrates that Congress intended to confer federal rights on them. *Cf. Boatowner,* 716 F.2d at 673 ("There is no indication that the statute was intended to benefit specially the pleasure craft owners ... nor that Congress intended to confer federal rights on [them]."). Rather, the Act was passed to protect the domestic fisheries from depletion. *See Washington State Charterboat Association v. Baldridge,* 702 F.2d 820, 823-4 (9th Cir. 1983), *cert. denied,* 464 U.S. 1053 (1984), and therefore does not confer rights upon appellants.[2]

Having concluded that the statutory enforcement provisions are exhaustive and that the Magnuson Act does not confer "enforceable rights" upon appellants, it is clear that the district court did not err in concluding that appellants do not have a section 1983 claim under this theory.

---

2 Appellants claim that Congress' intent to create a privately enforceable right through the Magnuson Act is demonstrated in the Act's requirement that federal regulations "not discriminate between residents of different states," 16 U.S.C. 1851(a)(4), and through the Act's introduction, articulating the Congressional policy that implementation of the Act be responsive to the needs of U.S. citizens and not unnecessarily impede legitimate uses of the high seas. 16 U.S.C. 1801(c)(2)-(3). Viewed in context, those sections confer neither substantive rights, nor an enforcement right.

§ 658.22 Tortugas shrimp sanctuary.

The area commonly known as the *Tortugas Shrimp Sanctuary,* off the State of Florida, is closed to trawl fishing. The area is that part of the EEZ shoreward of a line connecting the following points (see figure 1):

Point	Latitude	Longitude	Common name
N	25°52.9′N	81°37.95′W	Coon Key Light
F	24°50.7′N	81°51.3′W	
G	24°40.1′N	82°26.7′W	New Grounds Shoals Light
H	24°34.7′N	82°35.1′W	Rebecca Shoals Light
P	24°34.7′N	82°08′W	Marquessas Keys

United States Code Annotated
Title 16 § 1856(3)

(3) Except as otherwise provided by paragraph (2), a State may not directly or indirectly regulate any fishing vessel outside its boundaries, unless the vessel is registered under the law of that State.

United States Code Annotated
Title 42 § 1983

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

United States Code Annotated
Title 42 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

* * *

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 89-5851

FREEMAN R. BATEMAN,
Plaintiff/Appellee

v.

THOMAS GARDNER, et al.,
Defendants/Appellants

and

UNITED STATES OF AMERICA,
Intervenor/Appellee

MOTION FOR MODIFICATION OR CLARIFICATION OF JUDGMENT

Intervenor-Appellee United States hereby moves for modification or clarification of the Court's *per curiam* decision of December 20, 1990. In particular, the United States believes it is essential for the Court to set forth its rationale for affirming the district court. We do not petition for rehearing, because it is possible that this Court's decision simply stands for the proposition that the Florida statute at issue is preempted by operation of the Supremacy Clause, due to a conflict with applicable federal regulations implementing the Magnuson Fishery Conservation Act. However, if the decision also stands for the proposition that state efforts to regulate their own vessels in the Exclusive Economic Zone (EEZ) deny the equal protection of the laws, the case would then have serious negative ramifications for the implementation of the Magnuson Act. The specific grounds for this request are as follows:

This Court's decision affirmed the judgment below "on the basis of the district court's opinion dated July 11, 1989." The district court found that the Florida statute in question was invalid (insofar as it applied to Florida vessels in the Exclusive Economic Zone) under the Equal Protection clause of the Fourteenth Amendment and under the Supremacy Clause of the Constitution. *Bateman v. Gardner,* 716 F. Supp. 595, 597-598 (S.D. Fla. 1989). In our brief, we urged this Court to affirm on the basis of the Supremacy Clause rationale only, since the Equal Protection ruling appeared to create a direct conflict with *Skiriotes v. Florida,* 313 U.S. 69 (1941)(see U.S. Br. at 14, 26-28).

It is important that this Court spell out whether and to what extent it agrees with the equal protection rationale of the district court. Does the Court believe that the equal protection rationale is essentially dicta, since the judgment rests on an independent ground (i.e., preemption)? Does the Court, on the other hand, believe that the Florida statute denies equal protection, and if so, is it because all state statutes which impose stricter regulations on their own fishermen in the EEZ are unconstitutional, or because this particular enactment was infirm? If the latter, was the infirmity due to the Florida legislature's asserted failure to explain the reasons for regulating only Florida fishermen, as some language in the district court decision suggests, 716 F. Supp. at 497, or some other reason.[1]

---

1 In our view, it should not be necessary for a state legislature to explain why it only regulates its own fishermen, since it is obvious that a state has no jurisdiction to regulate the fishermen of other states who are fishing in the EEZ.

The district court opinion is ambiguous as to whether its equal protection rationale would apply to all state efforts to regulate in the EEZ or only to those efforts that are not sufficiently explained by the legislature.

This case would not appear to fit the usual criteria for unpublished opinions. In particular, whenever a federal court strikes down a state statute as invalid under the United States Constitution, an explanation would appear to be warranted. Here, the district court's explanation for its equal protection ruling was extremely brief and failed to deal with the Supreme Court's most recent ruling on the issue of state regulation of fishing outside a State's territorial waters. In *Skiriotes,* 313 U.S. at 75, the Supreme Court squarely held that Florida's regulation of sponge fishing by its own citizens outside Florida waters did not violate the equal protection guarantee. Neither the district court nor this Court has explained why *Skiriotes* is not applicable here.

These issues are important to the federal government as well as to the states. In implementing the Magnuson Act, the federal government must at all times rely on a state's regulation of its own vessels in the EEZ, *e.g.,* before a Fishery Management Plan can be put in place, or where a state management measure is consistent with the Fishery Management Plan. Non-conflicting state regulation of state-registered vessels in the EEZ is specifically authorized by Section 306(a)(3) of the Magnuson Act, 16 U.S.C. 1856(a)(3). If, contrary to *Skiriotes,* this sort of regulation is constitutionally infirm, an important element of the fishery protection scheme established by the Magnuson Act will have been lost. Thus, it is essential that the Court spell out whether and to what extent such regulation may violate the equal protection guarantee. There is bound to be further litigation over the states' powers in the EEZ,[2] and much

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2 Indeed, there is currently pending in the Southern District of Florida a case challenging as violative of equal protection Florida's regulations setting landing limits on mackerel harvested in the EEZ. *Southeastern Fisheries Assoc. v. Martinez,* No. 90-10071-Civ-King (complaint filed October 4, 1990).

time will be spent trying to resolve what precedential effect, if any, the instant decision may have. It would conserve judicial resources, as well as those of future litigants, if the Court would take this opportunity to explain the basis for its decision herein. For the reasons set out in our brief, we continue to believe that the only sustainable rationale for upholding the district court's judgment is one that relies on preemption, rather than equal protection.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Modification or Clarification of Judgment have today been served upon counsel by placing the same in the United States mail, postage prepaid, properly addressed, this 3rd day of January, 1991, to:

Eric J. Taylor
Assistant Attorney General
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_____/s/_____
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90-1498

Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

THOMAS GARDNER, Individually, and as Executive Director of the Florida Department of Natural Resources, and MAJOR RONALD McCULLERS, Individually, and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Petitioners,

vs.

FREEMAN R. BATEMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Petitioners THOMAS GARDNER and MAJOR RONALD McCULLERS filed two (2) separate appeals in the Eleventh Circuit. Appeal Number 89-5851 was the appeal on the merits of the Trial Court Final Judgment dated July 11th, 1989 and reported as *Bateman v. Gardner*, 716 F.Supp. 595 (S.D. Fla. 1989). The second appeal was under Case No. 90-5125 and it concerned the January 12th, 1990 Order Awarding Attorneys Fees and Costs which is reported as *Bat man v. Gardner*, Case No. 87-10062-CIV-KING (S.D. Fla. Jan. 12, 1990).

In the Petitioners' Questions Presented for Review, reference is made only to the January 12th, 1990 Order Awarding Attorneys Fees and Costs. The two (2) separate appeals were combined by the Eleventh Circuit for purposes of oral argument. In the December 20th, 1990 Per Curiam Affirmance, the attorneys fee appeal was affirmed pursuant to the Petitioners' concession both in Motions to the Eleventh Circuit and at oral argument before the Eleventh Circuit.

Respondent FREEMAN R. BATEMAN brought his action in the United States District Court for the Southern District of Florida asserting that a Florida Statute was being enforced in a discriminatory fashion. Mr. Bateman was facing arrest and confiscation of his vessel and catch nearly thirty (30) miles from land in the United States Exclusive Economic Zone. Under the Petitioners' enforcement practices, vessels identical to the Respondent's, registered in other states, would be free to harvest the same

QUESTIONS PRESENTED FOR REVIEW – Continued

federal resources pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq. and its fishery management regulations, 50 C.F.R. § 658 et seq. The District Court in both the Order on the Merits and Award of Attorneys Fees held that there was an equal protection violation. The Petitioners acknowledged that they had no authority under the Magnuson Act to enforce the Florida Statute against non-Floridians outside the state's territorial waters. The District Court held that prohibiting Florida fishermen from fishing within a portion of the United States Exclusive Economic Zone denied equal access of all United States citizens to the federal fishery resources. The federal law permitted shrimping in the area by all United States commercial fishermen, but the Petitioners' application of the Florida Statute prohibited the Respondent FREEMAN BATEMAN from harvesting the federal shrimp resources in the area. The Court held:

> Under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not.

This Equal Protection conflict between the state and federal law was the basis for invocation of the Supremacy Clause by the District Court.

The District Court, in its attorneys fee award, made it clear that although the Supremacy Clause *by its own force* did not create rights enforceable under 42 U.S.C. § 1983, the Magnuson Act itself and the Federal Fishery Management Plan adopted under the Act did grant such federal rights. The Court held that the Magnuson Act was

QUESTIONS PRESENTED FOR REVIEW – Continued

enacted to benefit and protect commercial fishermen like the Respondent and that the Act mandated that, "Conservation management measures shall not discriminate between residents of different states". The District Court held that Petitioners' interference with Respondent's equal access to the federal fishery resources was a denial of rights, privileges and immunities that were secured by the Constitution and laws of the United States and that the violation of such federal rights that were implicit in the statute's language and structure was as much a direct violation of a right as was a violation clearly set forth in the text of the statute. The District Court cited this Court's decision in *Golden State Transit Corp. v. City of Los Angeles,* 110 S.Ct. 444 (1989) for this proposition.

In light of the above, the two (2) questions presented by the Petitioners must be supplemented by the following questions. These questions go to the basis of the validity of the Eleventh Circuit's Per Curiam Affirmance on both the merits and the attorney's fees appeals.

QUESTIONS PRESENTED FOR REVIEW – Continued

1.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE AGAINST FLORIDA REGISTERED VESSELS (OR FLORIDA CITIZENS) CONSTITUTE A VIOLATION OF A FEDERAL "RIGHT TO FISH" WHICH IS EITHER EXPRESS OR IMPLICIT WITHIN FEDERAL LAW OR REGULATIONS?

2.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE INTERFERE WITH RIGHTS, PRIVILEGES OR IMMUNITIES GRANTED TO ALL UNITED STATES CITIZENS BY THE UNITED STATES CONSTITUTION AND FEDERAL LAW?

3.

DOES THE PETITIONERS' ENFORCEMENT OF THE FLORIDA STATUTE WITHIN THE UNITED STATES EXCLUSIVE ECONOMIC ZONE DEPRIVE THE RESPONDENT OF EQUAL ACCESS TO FEDERAL FISHERY RESOURCES AND THEREBY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

THOMAS GARDNER, Individually, and as Executive Director of the Florida Department of Natural Resources, and MAJOR RONALD McCULLERS, Individually, and as Monroe County District IX Supervisor of the Florida Marine Patrol,

Petitioners,

vs.

FREEMAN R. BATEMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The Respondent is satisfied with the Petitioners' Citations to the Opinions Below.

JURISDICTIONAL STATEMENT

Conflicting Circuit Court Opinions

The Respondent FREEMAN R. BATEMAN is strongly opposed to the jurisdictional statement which cites the unpublished Ninth Circuit Opinion in *North Pacific Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). The citation of this unpublished opinion as "conflicting precedent" is a direct violation of Ninth Circuit Rule 36-3. The Ninth Circuit Rule is non-discretionary and it states that such an Opinion:

> . . . shall not be regarded as precedent and shall not be cited to or by this Court or any District Court of the Ninth Circuit . . .

The Eleventh Circuit in *Sorrell v. Commissioner*, 882 F.2d 484, 487 n.11 (11th Cir. 1989) held that unpublished opinions under Ninth Circuit Rule 36-3 " . . . may not be cited except when relevant under the Doctrine of Law of the Case, Res Judicata, or Collateral Estoppel."

Inasmuch as this Court's Certiorari Review is to determine conflicting cases of *precedent* from different circuits, it is frivolous and therefore, a Rule 11 violation for the Petitioners to attempt to assert such "conflict" based upon a Ninth Circuit unpublished opinion that . . . "shall not be regarded as precedent . . . " and . . . "shall not be cited . . . either in briefs, oral argument, opinions, memoranda or orders . . . ". See Appendix for full text of Rule. The Petitioners' violation of the Ninth Circuit Rule should not be countenanced by this Court.

The Seventh Circuit in *Aetna Casualty and Surety Company of Hartford Connecticut v. Kerr McGee Chemical Corporation*, 875 F.2d 1252, 1255 n.2 (7th Cir. 1989) stated that such unpublished opinions have "no precedential value". The Seventh Circuit clarified its own "unpublished opinion" Rule and stated:

> With respect to the precedential value of opinions of other courts, we may look to the rules of those courts.

It is respectfully submitted that based on the above rules and case law, all references to the Ninth Circuit unpublished opinion in *North Pacific Fishing Vessel Owners Association v. Sheffield*, should be stricken and that this Court should consider sanctions for Petitioners' violation of the Ninth Circuit Rule.

In *Browder v. Director Department of Corrections of Illinois*, 434 U.S. 257, 258 (1978), this Court stated:

> Finally, Petitioner questioned the validity of the Seventh Circuit's "unpublished opinion" rule. We leave these questions to another day. Id. at 258.

If today happens to be the "other" day this Court referred to, it should be noted that the *North Pacific Vessel Owners Association v. Sheffield* case was decided before this Court's Supremacy Clause decision in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989) and this Court's Commerce Clause decision in *Dennis v. Higgins*, 111 S.Ct. 865 (1991). The District Court Opinions and the Eleventh Circuit's Per Curiam Affirmance are directly in line and complementary to this Court's decisions in *Golden State* and *Dennis v. Higgins*.

Conflict With This Court's Opinions

The Per Curiam Affirmance of the Eleventh Circuit did not conflict with this Court's decision in *Skiriotes v. Florida*, 313 U.S. 69 (1941). *Skiriotes* is expressly based, in at least four (4) places, on the premises that no conflicting federal legislation existed. The decisions below are in agreement with this Court's decision in *U.S. v. Florida*, 425 U.S. 791 (1975) which held that the State of Florida was not entitled to *any interest* in the natural resources beyond the State's territorial boundaries. The decision below is in agreement with Justice Field's dissent nearly one hundred (100) years ago in *Geer v. Connecticut*, 161 U.S. 519 (1896) when he stated that when a wild animal "becomes an article of commerce . . . its use cannot be limited to the citizens of one state to the exclusion of citizens of another state". Eighty-three (83) years later this Court overruled *Geer* in *Hughes v. Oklahoma*, 444 U.S. 322 (1979). In *Hughes*, this Court concluded that:

> The overruling of *Geer* does not leave the state's powerless to protect and conserve wild animal life *within their borders*. Today's decision makes clear, however that states may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the nation'. *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 at 538, 69 S.Ct. 657 at 665 (1949) (emphasis added)

Jurisdictional Conclusion

The Court of Appeals for the Eleventh Circuit Per Curiam Affirmed the District Court without opinion on December 20th, 1990. There is simply no conflicting precedent established by Petitioners' citation of *North Pacific*

Vessel Owners Association v. Sheffield, in violation of the Ninth Circuit unpublished opinion rule, nor is there any conflict with this Court's decision in *Skiriotes v. Florida*. This Court should not issue the Writ of Certiorari to the Court below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Respondent is satisfied with the Petitioners' statement of Constitutional and Statutory Provisions except to add:

> Privileges and Immunities Clause of Article IV, Section 2, United States Constitution;
>
> Privileges and Immunities Clause of Amendment XIV, Clause 2, United States Constitution;
>
> Ninth Circuit Rule 36-3;
>
> The above cited constitutional and statutory provisions are set out verbatim in the Appendix hereto.

This Court should not grant discretionary review of this case because the Per Curiam Affirmance by the United States Court of Appeals for the Eleventh Circuit is not a decision which conflicts with any other decision of a Court of Appeals on the same matter [Sup. Ct. R. 10.1(a)]. The Per Curiam Affirmance does not raise an important question of federal law which remains outstanding in light of this Court's decisions in *Golden State* and *Dennis v. Higgins*, [Sup. Ct. R. 10.1(b)]. And finally, the Eleventh Circuit's Per Curiam Affirmance of the District Court Orders on the merits and attorneys fees did

not decide any federal question which conflicts with any applicable decision of this Court [Sup. Ct. R. 10.1(c)].

STATEMENT OF THE CASE

The Respondent agrees to a great extent with the Statement of the Case by the Petitioners; however, it should be pointed out that the District Court decision did *not* rest on Preemption, but Petitioners' denial of Respondent's equal access to federal fishery resources of the United States Exclusive Economic Zone. In the District Court decisions it was pointed out that the "problem which is of the greater concern to this Court" was the unequal treatment of persons from different states with regard to the harvest of federal fishery resources outside the state's territorial waters. In the Order Awarding Attorneys Fees and Costs, the District Court made it clear that although the Supremacy Clause, of its own force, does not create rights enforceable under 42 U.S.C. § 1983 (1988), the Magnuson Act does not preclude a § 1983 remedy since there is no mechanism in the Act to address state interference with the federally protected fishing rights. The Magnuson Act itself is inextricably involved with interstate commerce since the harvesting of the federal fishery resources is beyond the territorial limits. All fishery resources harvested under the Magnuson Act begin their journey into the streams of commerce by crossing a state line to the nearest port. The District Court relied on this Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989) for the proposition that the Magnuson Act contains rights, privileges or immunities which were enacted to benefit and protect

United States commercial fishermen. The Magnuson Act "codified" the Commerce Clause and the Equal Protection Clause by stating that, "Conservation management measures shall not discriminate between residents of different states." 16 U.S.C. § 1851(4).

SUMMARY OF ARGUMENT

Two and one-half (2¹/₁) pages of the three and one-half (3¹/₂) pages of Argument advanced by the Petitioners are devoted to showing conflict with the "precedential authority" of the unpublished Ninth Circuit Opinion in *North Pacific Fishing Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). In the Respondent's Appendix are a few portions of the unpublished Opinion which the Petitioners forgot to mention. In *Sheffield* the District Court's dismissal order was premised *exclusively* on preemption. Since *Sheffield* was decided prior to *Golden State Transit Corp. v. Los Angeles*, 110 S.Ct. 444 (1989), and *Dennis v. Higgins*, 111 S.Ct. 865 (1991), this Court's clarification of standing to bring a 42 U.S.C. § 1983 action was not available to the Ninth Circuit *even if* the unpublished Opinion had been published and could be cited as conflicting precedent.

Under *Golden State* and *Dennis v. Higgins*, either the Supremacy Clause or the Commerce Clause can be held to confer "rights, privileges and immunities" within the meaning of 42 U.S.C. § 1983 (1991). Both Clauses are substantive restrictions on permissible state regulation and individuals injured by such state action are allowed to sue and obtain injunctive and declaratory relief under

42 U.S.C. § 1983. In both of these recent decisions there are three (3) considerations which determine whether an enforceable "right, privilege or immunity" exists. First the provision must create an obligation binding on the governmental unit as opposed to merely stating a congressional preference. Second, the plaintiff's interests must not be too vague or amorphous to be beyond the judiciary's competence to enforce. And finally, the provision of the Constitution or federal law must have been intended to benefit the plaintiff.

In the District Court Opinions it is clear that the Supremacy Clause, the Commerce Clause and the Magnuson Act itself were designed to benefit individuals such as the Respondent FREEMAN R. BATEMAN. The Petitioners' denial of equal access to the federal fishery resources (open to all United States fishermen under the provisions of the Magnuson Act and Fishery Management Plan) violated the Supremacy Clause, the Commerce Clause, Equal Protection and deprived the Respondent FREEMAN R. BATEMAN of rights, privileges and immunities secured to him by the Constitution and federal statutory law.

ARGUMENT AGAINST GRANTING THE WRIT

THE PER CURIAM AFFIRMANCE OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT "CONFLICT" WITH ANY PRECEDENT ESTABLISHED BY ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME QUESTION OF LAW.

In the first two (2) paragraphs of Argument, the Petitioner cites both this Court's decision in *Dennis v.*

Higgins, 111 S.Ct. 865 (1991) and portions of the unpublished Opinion of the Ninth Circuit in *North Pacific Vessel Owners Association v. Sheffield*, 852 F.2d 572 (Table) (9th Cir. 1988). In *Dennis v. Higgins* this Court pointed out that the mistake made by the Nebraska Supreme Court was in relying on *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), Cert. Den., 469 U.S. 834 (1984) which held that claims under the Commerce Clause are not cognizable under § 1983 because the Commerce Clause . . . "Does not establish individual rights against government, but instead *allocates power between the state and federal governments*". *Consolidated*, 730 F.2d at 1144. (emphasis supplied)

The mistaken reliance by the Nebraska Supreme Court, corrected in *Dennis v. Higgins*, is remarkably similar to the analysis of Commerce Clause and Supremacy Clause by the Ninth Circuit in *Sheffield*. In the unpublished Opinion (which cannot be cited as precedent under Ninth Circuit Rule 36-3), the Ninth Circuit states:

> This Court noted in *White Mountain* that the Commerce Clause was analogous to the Supremacy Clause in that it functions as a *'allocation of power between national and state governments'*, 810 F.2d 849, and does not create individual 'rights, privileges and immunities within the meaning of § 1983'. 810 F.2d at 850 . . . From the plain language of the District Court's denial of their Motion, it is clear that appellants prevailed on the merits of only their Supremacy Clause claims, which itself does not provide a basis for attorneys fees, costs, and expenses under Section 1988. Like their Supremacy Clause claim, appellant's claims under the Magnuson Act and the Commerce Clause do not

> constitute cognizable Section 1983 claims. (emphasis added)

The unpublished Opinion in *Sheffield* came out before the broad construction of § 1983 claims recently required by this Court. The entitlement to § 1983 relief under *Golden State* with regard to the Supremacy Clause and the entitlement to § 1983 relief under the Commerce Clause in *Dennis v. Higgins* amounts to a "right, privilege or immunity" under the ordinary meaning of those terms. *Dennis v. Higgins*, 111 S.Ct. 865 (1991) quoted this Court's decision in *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) for the proposition that:

> To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and the laws of the United States. *Dennis*, 111 S.Ct. at 871.

The District Court decisions, Per Curiam Affirmed by the Eleventh Circuit, stand for the same proposition as this Court's decisions in *Crutcher v. Kentucky, Golden States,* and *Dennis v. Higgins.*

The Federal District Court, under 42 U.S.C. § 1983, protected the Respondent FREEMAN R. BATEMAN's equal access to the federal fishery resources of the United States Exclusive Economic Zone. Fishing for shrimp under the Magnuson Act and the Fishery Management Plans adopted pursuant to the Act is an explicit or an implied right. It is a right which every United States fishermen is entitled to exercise under the Constitution and laws of the United States. The Respondent's federal fishing activities in the United States Exclusive Economic

Zone, *miles* beyond Florida's territorial boundaries, is a right, privilege and immunity which is binding on the State of Florida. It is a right which is within the competence of the judiciary to enforce and it is a right whose intended beneficiaries include Respondent FREEMAN R. BATEMAN.

After this Court's Opinions in *Golden State* and *Dennis v. Higgins*, the Petitioners cannot argue that the Supremacy Clause and the Commerce Clause do not confer rights within the meaning of 42 U.S.C. § 1983 because they were not designed to benefit individuals, but rather designed to promote national, economic and political union. In *Dennis v. Higgins*, 111 S.Ct. 865, 871 (1991), this Court pointed out that this argument had been "implicitly rejected" in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 321, n.3 (1977).

This Court's Opinion in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) quotes Justice Jackson's Opinion in *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) for the proposition that:

> Our system, fostered by the Commerce Clause, is that every farmer (fisherman?) and every craftsman shall be encouraged to produce (fish for shrimp?) by the certainty that he will have free access to every market in the nation, that no home embargoes (enforcement of state laws?) will withhold his exports (imports of shrimp caught in the United States Exclusive Economic Zone?) and no foreign state will by customs, duties or regulations, exclude them. Likewise, every consumer may look to the free competition from every producing area in the nation (United States Exclusive Economic Zone?) to protect him from exploitation by any. Such was

> the vision of the founders; such has been the doctrine of this court which has given it reality. *Dennis v. Higgins*, 111 S.Ct. at 872.

The Supremacy Clause, the Commerce Clause and other rights, privileges and immunities secured by federal law prohibit state regulation of federal fishery resources in the United States Exclusive Economic Zone. These prohibitions are the source of a right of action in those injured. The District Court's decisions and the Per Curiam Affirmance by the Eleventh Circuit would be hailed by Justice Jackson as carrying on the vision of the founders of this nation.

THE PER CURIAM AFFIRMANCE OF THE ELEVENTH CIRCUIT DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTED WITH AN APPLICABLE DECISION OF THIS COURT.

The Petitioner relies upon *Skiriotes v. Florida*, 313 U.S. 69 (1941) for the proposition that . . . "a state regulation of its citizens on the high seas was not an equal protection violation if it applied equally to all persons within the state's jurisdiction." Petitioners' Brief, page 8. An understanding of the issues in *Skiriotes* is necessary in order to put this Court's Opinion in perspective. The Supreme Court of Florida decided *Skiriotes v. State*, 197 So. 736 (Fla. 1940) on the basis that:

> There is no dispute about the facts. It is admitted that the alleged offense was committed within the state if the boundary as fixed by the Constitution of 1885 is controlling . . . Petitioner contends that the marine boundary of the state is fixed by international law at one marine league from shore and that the offense was committed beyond this limit. *Skiriotes*, 197 So. at 737.

The Supreme Court of Florida went on to hold that the western boundary of Florida *was* three marine leagues and that the offense *was* committed within the jurisdiction of the state. *Skiriotes,* 197 So. at 739.

In affirming the judgment of the Florida Supreme Court, this Court stated:

> It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute *so far as applied to conduct within the territorial waters of Florida,* in the absence of conflicting federal legislation, is within the police power of the state. (citations omitted) Nor is there any repugnance in the provisions of the statute to the Equal Protection Clause of the Fourteenth Amendment. The statute applies equally to all persons within the jurisdiction of the state. *Skiriotes,* 313 U.S. at 75.

The Equal Protection analysis in *Skiriotes* pertained to Florida's *territorial* jurisdiction over all persons. It pertained . . . "to conduct within the territorial waters of Florida . . . ". Id. at 75.

Fifty (50) years ago, in *Skiriotes,* Chief Justice Hughes repeatedly pointed out that any extraterritorial enforcement of Florida's laws was valid *only;* if not . . . "modified by superior federal law". Id. at 72; . . . "in the absence of conflicting federal legislation". Id. at 75; . . . "where there is no conflict with Acts of Congress". Id. at 77; . . . "when its action does not conflict with federal legislation." Id. at 78-79.

This Court's Opinion in *Skiriotes v. Florida,* 313 U.S. 69 (1941) seems to have anticipated the exact legal and factual setting as is present in this action. Chief Justice

Hughes stated, "We have not been referred to any legislation of Congress [Magnuson Act?] with which the state statute conflicts". Id. at 74; "No question as to the authority of the United States over these waters [United States Exclusive Economic Zone?] or over the sponge fishery [federal shrimp management plan?], is here involved." Id. at 76

The rationale in *Skiriotes* may very well be the rationale that was adopted by this Court in *Geer v. Connecticut*, 161 U.S. 519 (1896) which held that the use of wild animals within state boundaries could be limited to the citizens of one state to the exclusion of citizens of another. This Court overruled *Geer* in it's decision in *Hughes v. Oklahoma*, 444 U.S. 322 (1979).

In *Hughes v. Oklahoma*, and in this Court's recent Opinion in *Dennis v. Higgins*, 111 S.Ct. 865 (1991) Justice Jackson's Opinion in *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) was cited for the proposition that "our economic unit is the nation". In *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court concluded that while the state may protect and conserve the natural resources available *within* its territorial boundaries, it may not discriminate among participants. The District Court was undoubtedly correct in concluding that Petitioners could not discriminate among participants in the harvest of federal natural resources of the United States Exclusive Economic Zone without offending the Equal Protection Clause of the Fourteenth Amendment.

The end of the applicability of *Skiriotes v. Florida*, 313 U.S. 69 (1941) by reason of "conflict with federal law" occurred at least as early as January 26th, 1976. At that

time the State of Florida and the United States entered into a "Joint Motion for Entry of a Decree" which was granted by this Court. *United States v. Florida*, 425 U.S. 791, 793 (1976). This Court decreed, as *stipulated* by the State of Florida, that:

> The United States is additionally entitled as against the State of Florida, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than three marine leagues from the state's historic coastline (but not less than three geographic miles from its coastline), and *the State of Florida is not entitled to any interest in* such lands, minerals, and *resources*. (emphasis added) *United States v. Florida*, 425 U.S. at 793.

After this Court's decision in *U.S. v. Florida*, 425 U.S. 791 (1976), the United States Congress passed the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et. seq. Congress provided at § 1812(1) for the exclusive federal fishery management authority over *all fish* within the Fishery Conservation Zone extending from the territorial limits of each coastal state seaward for a distance of two hundred (200) miles. On May 29th, 1981, the Gulf of Mexico Shrimp Fishery Management Plan, 50 C.F.R. § 658 et. seq. was developed under the Magnuson Act and implemented by the Secretary of Commerce. The Federal Shrimp Plan closed certain areas to shrimping . . . "within that portion of the Gulf of Mexico over which the United States exercises *exclusive* fishery management authority". (emphasis added) 50 C.F.R. § 658.1(b). Congress stated that the federal resources outside the territorial limits of the coastal states were to be treated as a *single uniformly regulated* resource for the benefit of all

citizens of the United States without regard to citizenship or state of incorporation. 16 U.S.C. § 1851(4).

The present conflict with federal law which this Court anticipated in *Skiriotes v. Florida*, 313 U.S. 69 (1941) now forbids state extraterritorial regulation. This conflict was specifically found by the District Court in its July 11th, 1989 Order. The Court held that:

> In this area, which is in dispute here, federal law permits shrimping, but the application of the Florida Statute prohibits Floridian fishermen from doing so. . . . Under the federal regulation, the Plaintiff may take shrimp in the disputed area, while under the state statute, he may not.

Skiriotes v. Florida, 313 U.S. 69 (1941) is not in conflict with the District Court's decisions which were Per Curiam Affirmed by the Eleventh Circuit.

CONCLUSION

The unpublished Opinion in *Sheffield* is not precedent of the Ninth Circuit under the Ninth Circuit's Rule 36-3. Since *Sheffield* cannot be "precedent" of the Ninth Circuit, then the Eleventh Circuit's Per Curiam Affirmance of the District Court's decision cannot be in "conflict" so as to form a basis for this Court's grant of Certiorari Review. Even if *Sheffield* was a published Opinion and could be relied upon as Ninth Circuit precedent, it is clear that this Court's intervening decisions in *Golden State* and *Dennis v. Higgins* have held that the rights, privileges and immunities violated by the Petitioners *are* actionable under § 1983. The Respondent as an individual who was injured by the Petitioners' State action and he had standing to sue

and obtain the injunctive and declaratory relief given by the District Court and affirmed by the Eleventh Circuit.

Finally, *Skiriotes v. Florida*, 313 U.S. 69 (1941) did not survive the joint stipulation Florida entered into with the United States which was recognized by this Court in *U.S. v. Florida* 425 U.S. 791 (1976). The State of Florida stipulated that it had *no interest* whatsoever in the natural resources beyond its boundaries and that such resources were subject to *exclusive* federal ownership and control on behalf of all United States citizens. The Magnuson Act, which was passed after this Court's 1976 decision in *U.S. v. Florida*, clarified that whatever fishery management occurred *at all*, in the United States Exclusive Economic Zone, would be federal. With regard to the management of federal fishery resources, state extraterritorial jurisdiction (over management of natural resources) under *Skiriotes v. Florida*, 313 U.S. 69 (1941) came to an end in 1976. The Writ must be denied.

Respectfully submitted,

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North Pacific Fishing Vessel Owners' Association, et al.,

Plaintiffs-Appellants,

v.

Bill Sheffield, Governor, State of Alaska, et al.,

Defendants-Appellees.

No. 87-3646

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 8, 1988.
Decided July 7, 1988.

D.Alaska
AFFIRMED.

[DO NOT PUBLISH]
[Respondent's Note: The following is excerpted from the unpublished opinion. Ninth Circuit Rule 36-3 prohibits citation in briefs, opinions, memoranda or orders.]

The District Court's original dismissal order was premised exclusively on Appellants' preemption claim. None of the other constitutional claims were mentioned. On January 21, 1987, after supplemental responses had been made by both parties, the District Court issued an order denying the Appellants' Motion for Attorney's Fees. The Court stated that, while Appellants had "prevailed on the merits," they had failed to state any cognizable Section 1983 claim. The Court also stated that it had relied primarily on the Supremacy Clause challenge in granting the temporary restraining order, and neither that claim nor any of Appellants' other claims sufficiently supported a request for attorney's fees under Section 1988.

* * *

Because Appellants' Magnuson Act, Supremacy and Commerce Clause claims are not actionable under Section 1983, the issue of substantiality for purposes of Section 1988 is never reached with regard to these claims. As for Appellants' remaining claims, while substantiality is relevant, the claims nonetheless fail. Each of these issues will be discussed in turn.

* * *

Appellants claim that they presented a substantial Section 1983 claim under a Commerce Clause theory is equally without merit. This Court noted in *White Mountain* that the Commerce Clause was analogous to the Supremacy Clause in that it functions as an "allocation of power between national and state governments,", 810 F.2d at 849, and does not create individual "rights, privileges, and immunities within the meaning of Section 1983." 810 F.2d at 850; accord *International Org. of Masters, Mates, and Pilots v. Andrews*, 831 F.2d 843 (9th Cir. 1987), cert. den. 108 S.Ct. 1228 (1988). Thus, Appellants' Commerce Clause claim also fails to support their Motion for Attorney's Fees . . .

From the plain language of the District Court's denial of their Motion, it is clear that Appellants prevailed on the merits of only their Supremacy Clause claims, which itself does not provide a basis for attorney's fees, costs, and expenses under Section 1988. Like their Supremacy Clause claim, Appellants' claims under the Magnuson Act and the Commerce Clause do not constitute cognizable Section 1983 claims. In addition, Appellants other unadjudicated constitutional claims fail, as they are not sufficiently supported in the record by their factual law.

Thus, we conclude that the District Court was correct in holding that Appellants are not entitled to attorney's fees, costs, and expenses under Section 1988.

Ninth Circuit Rule 36-3 (Do Not Publish – Opinions)

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this court or any District Court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the Doctrines of Law of the Case, Res Judicata, or Collateral Estoppel.